

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES HOPKINS and TYGER
JENKINS,

Defendants and Appellants.

A092437

(San Francisco County
Super. Ct. Nos. 174891-03 & 174891-
02)

After a jury trial, appellants Charles Hopkins and Tyger Jenkins were convicted of multiple counts of assault with a firearm, and other offenses, arising from an alleged home invasion robbery. The offenses involved three victims, two of whom sustained gunshot wounds. Appellants contend their convictions were the result of: (1) the improper removal of a juror; (2) prosecutorial misconduct; (3) the erroneous denial of a motion for a mistrial; and (4) instructional error. We affirm the judgments.

BACKGROUND

Appellants and codefendant Anthony Jaime were charged with the following offenses against Chivo Thomas: first degree robbery (Pen. Code § 212.5, subd. (a)¹; count I), assault with a firearm (§ 245, subd. (a)(2); count II), and battery causing serious bodily injury (§ 243, subd. (d); count IV). Appellant Hopkins was separately charged with two offenses against Pietot Alcalá: assault with a firearm (§ 245, subd. (a)(2); count

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

III) and battery causing serious bodily injury (§ 243, subd. (d); count V). The indictment also included allegations that Hopkins: (1) was armed with a firearm (§ 12022, subd. (a)(1)) in the commission of count III; (2) used a firearm (§ 12022.5, subd. (a)) in the commission of counts I, II, III, IV, and V; (3) discharged a firearm (§12022.53, subd. (c)) in the commission of count I; (4) discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) in the commission of count I; and (5) inflicted great bodily injury (§ 12022.7, subd. (a)) in the commission of counts I, II, and III.

In addition to counts I, II, and IV, appellant Jenkins faced a separate count of assault with a firearm (§ 245, subd. (a)(2); count VI) on Hope Rose. It was further alleged that Jenkins: (1) used a firearm (§ 12022.5, subd. (a)) in the commission of counts I, II, IV, and VI; (2) used a firearm (§ 12022.53, subd. (b)) in the commission of count I; and (3) inflicted great bodily injury (§ 12022.7, subd. (a)) in the commission of counts I and II.

Appellants pleaded not guilty to the charges and denied the allegations. A two-week jury trial commenced in February 2000.

Prosecution Case

Chivo Thomas lived with his girlfriend, Hope Rose, his father, Tosh Alcala, and his uncle, Pietot Alcala, in a residence on Highland Street in San Francisco. Thomas, Tosh, and Pietot sold marijuana out of the residence. On January 31, 1998 at 12:30 p.m., Anthony Jaime, a friend of Thomas's, rang the front door bell and was let into the residence by Pietot. Pietot told Jaime that Thomas was upstairs, closed the front door, and returned to the kitchen. From the kitchen, Pietot saw two persons, later identified as appellants Hopkins and Jenkins, following Jaime up the stairs.

Thomas and Rose were in their bedroom packing clothes for a trip. A friend of theirs, Ian Avidan, was also in the room when Jaime and appellants entered. Thomas and Rose did not know Hopkins or Jenkins. Jaime told Thomas he had left a message on Thomas's pager and wanted to know why Thomas had not responded. Thomas denied having received any message from Jaime. Avidan left the room and went downstairs. Jenkins took a drink from a 40-ounce bottle of beer he was holding. Thomas and Rose

both told him they did not allow alcohol in their room. Jenkins put the beer down. Thomas and Rose told the men to leave because they were about to go on a trip.

Hopkins and Jenkins pulled out guns, announced, “This is a robbery,” and demanded money. Jenkins held a gun to Rose’s head and threatened to blow her brains out. Thomas grabbed the barrel of Jenkins’s gun and tried to pull it away from Rose’s head. He also tried to grab Hopkins’s gun. Shots were fired from both guns. Thomas sustained two gunshot wounds to his right leg. Thomas was also struck on the head with guns by two of the men. The men went through Thomas’s pockets as he lay on the floor, and Jaime grabbed his backpack and a cordless telephone.

Hearing the commotion, Pietot, Avidan, and Tosh went upstairs to investigate. Pietot opened the door to Thomas’s room and saw Hopkins standing over him. He tried to pull Hopkins off. Hopkins turned and shot Pietot once in the stomach, and Pietot fell to the floor. Avidan ran downstairs and out of the house. Hopkins directed Tosh back downstairs at gunpoint, and shut him into a bathroom. Jaime, Hopkins, and Jenkins then fled the house.

Police recovered several nine-millimeter bullet casings at the scene, and found Thomas’s loaded .22 caliber pistol on the floor of his bedroom. Thomas testified that he grabbed the pistol after the defendants had left his room, but fell to the ground with it due to his injuries. Police found no other firearms at the residence.

Thomas and Pietot suffered serious, permanent injuries as a result of their gunshot wounds. After Jenkins was arrested, he volunteered to officers that he had “fucked up.”

Defense Case

Hopkins testified that he accompanied Jaime and Jenkins to Thomas’s house on January 31, 1998. Jaime and Jenkins went there to buy marijuana and Hopkins wanted to smoke some. The woman with Thomas became agitated and started screaming for the men to leave. Jaime and Thomas got into an argument about the way the woman was behaving. Thomas grabbed a gun from his dresser, but Jaime knocked it out of his hand. Hopkins then pulled out his gun from his waistband. Thomas grabbed the barrel of Hopkins’s gun, which discharged each time Thomas pulled on it. After hearing the

woman screaming for Pietot to “get the shotgun,” Hopkins panicked. When the door opened and he felt someone grab him from behind, Hopkins put the gun under his arm and shot backwards without looking, hitting Pietot. He then ran down the stairs and fled the house, fearing he would be shot with the shotgun. He never held a gun on anybody.

Hopkins explained that he did not call the police because he did not trust the police to believe him. He testified about a 1997 incident in which responding officers mistreated him and accused him of criminal activity after he reported a threat made against him. Due to the threat, Hopkins carried a gun for protection.

In addition, the defense offered the following evidence to show that the claim the shootings occurred in the course of a robbery was a fabrication: (1) San Francisco police officer Raul Mendieta’s testimony that Rose and Tosh did not mention at first that any of the perpetrators grabbed a backpack, carried any objects other than guns, or marched Tosh downstairs at gunpoint; (2) testimony that police recovered \$800 in cash from Thomas’s pants pocket; and (3) the parties’ stipulation that in connection with an unrelated incident at the Alcala residence in 1995, police found a loaded shotgun in Pietot’s bedroom which was confiscated and later destroyed.

Verdict

The jury began deliberating on February 29, 2000 and returned its verdicts on March 3, 2000. Hopkins and Jenkins were found not guilty of first degree robbery. The jury found Hopkins guilty on counts II (assault with firearm on Thomas), III (assault with firearm on Pietot), IV (battery causing serious bodily injury on Thomas), and V (battery causing serious bodily injury on Pietot), and found all of the associated enhancement allegations true.

The jury found Jenkins guilty on counts II (assault with firearm on Thomas) and VI (assault with firearm on Rose), and found the associated firearm allegations true. The

jury also found Jenkins guilty of the lesser included offense of battery (against Thomas) on count IV.²

Following sentencing, Hopkins and Jenkins timely appealed.

DISCUSSION

Removal of Juror

The day before the case was submitted to the jury, Juror No. 11 reported that a woman he had seen in the courtroom during the trial had approached him at a San Francisco club and obtained his business card. After conducting a hearing into the incident in open court outside the presence of the other jurors, the trial court excused Juror No. 11 and substituted an alternate juror. Appellants contend that the trial court abused its discretion in removing the juror because the facts developed on the record were insufficient to demonstrate that Juror No. 11 was unable to discharge his duty fairly.

The following facts were established on the record: Juror No. 11 was at a San Francisco bar and restaurant with some friends on the evening after the previous court session. A friend asked him for one of his business cards, and the juror gave her one. A woman walked up behind him and said, “Could I have one of your business cards?” The juror said, “Sure,” and turned and handed her his card. As he did so, he recognized the woman as someone he had seen in the courtroom attending the trial. He told her that he could not speak to her and left the club. He saw her again in the parking lot outside of the club as she was apparently walking to her car. She said to him, “I know I can’t talk to you,” and he replied, “No, you can’t, stay away.” He then got in his car and drove away. Juror No. 11 denied the incident would affect his ability to be impartial, and denied forming any impression that the person was trying to influence him.³

² The jury was unable to reach a verdict as to codefendant Jaime on count I, convicted him of the lesser included offense of assault on count II, and found him not guilty on count IV.

³ When asked how the incident might affect his “view of what he needs to do as a juror,” Juror No. 11 responded: “It has no weight on my decision-making one way or the other. My job is to do what the evidence is given to me. I mean that’s what I do, but I

After the juror left the courtroom, court and counsel agreed that Hopkins's wife was the person who had approached Juror No. 11. The prosecutor asked the court to remove Juror No. 11 from the panel. After conferring, defense counsel stated they were not concerned about the juror. The trial court then ruled that Juror No. 11 would be excused and replaced with an alternate. Defense counsel offered no objection to the ruling when it was made.

Respondent contends that appellants waived their objection to the removal of Juror No. 11 by failing to timely object on the grounds sought to be raised on appeal. We agree. Appellants' counsel merely advised the trial court that they had no objection to Juror No. 11 remaining on the panel. That falls far short of making a "contemporaneous and specific" objection that the removal of the juror would deprive appellants of their constitutional right to a unanimous jury. (See *People v. Earp* (1999) 20 Cal.4th 826, 893.) Such a specific objection is necessary in order to afford the trial court an opportunity to correct its error and to preserve the issue for appellate review. (*Ibid.*; see also, *People v. Ashmus* (1991) 54 Cal.3d 932, 987, fn. 16 ["defendant may properly raise in this court a point involving a trial court's allegedly improper discharge of a juror only if he made the same point below"].)

Jenkins argues there was no effective waiver of the objection. According to Jenkins, the trial court prevented defendants from interposing any objection by twice admonishing counsel not to argue. We are unpersuaded. These admonishments were made while and because Juror No. 11 was present in the courtroom. Once he left, the court invited counsel to state their positions on the matter. Nothing prevented defense counsel from placing an objection to the removal of the juror on the record either before or immediately after the court ruled.⁴

thought I would -- I was instructed if it came up, I felt the need to call it to your attention."

⁴ We decline to consider Jenkins's further claim, raised for the first time in his reply brief, that his counsel was ineffective in failing to preserve the issue for appeal. The record is wholly insufficient to rule out the possibility that trial counsel remained

In any event, we would find no abuse of discretion. The trial court was not required to accept the juror's denial that he would be influenced by the incident at face value. (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838 [not enough for the juror alone to evaluate the facts and conclude they do not interfere with his impartiality].) Juror No. 11 knew that a person potentially associated with defendants had recognized him as a juror, and had obtained his name, workplace address, and telephone number. The juror was sufficiently concerned about the incident to report it to the court at his first opportunity. These facts amply support the trial court's exercise of its discretion to remove the juror, particularly when the removal does not occur during jury deliberations.

Prosecutorial Misconduct

Appellants contend that reversal is required due to the cumulative effect of the following alleged instances of prosecutorial misconduct: (1) vouching for the truthfulness of witnesses; (2) expressing personal opinions about witness credibility during rebuttal argument; and (3) calling the incident giving rise to the charges a "home invasion robbery" in the course of examining a police witness.

Thomas and Pietot testified under immunity agreements. During the prosecutor's direct examination of Thomas, the following colloquy occurred:

Q. Good afternoon, Mr. Thomas. Are you under order to testify in this case?

A. Yes.

Q. And have you been notified that anything you say will not be held against you?

A. Yes.

Q. And are you here to testify truthfully?

A. Yes.

silent because he was not sure whether removing Juror No. 11 was contrary to his client's interests.

A similar exchange occurred with Pietot:

Q. Mr. Alcala, did I talk to you over the weekend with respect to your testimony in this case?

A. Yes.

Q. Did I talk to you on the phone?

A. Yes.

Q. And did I tell you to do anything when you took the stand here in the courtroom today?

[Objection made by appellant Hopkins's trial counsel, and overruled.]

Q. Did I tell you to do anything when you took the stand?

A. To be truthful.

Q. And did I give you a grant of immunity?

A. Yes.

Q. Why did I give you that grant of immunity?

A. So I could speak truthfully.

According to appellants, by questioning Thomas and Pietot in this fashion, the prosecution was suggesting that the veracity of these witnesses was somehow guaranteed by the fact they had been given immunity agreements. We are not persuaded.

Vouching occurs when the prosecution states or implies that it has special knowledge, from sources not available to the jury, about a witness's credibility. (*People v. Williams* (1997) 16 Cal.4th 153, 257.) The defendant in *Williams* claimed the prosecutor improperly vouched for a witness by informing the jury that the witness had agreed to testify truthfully as part of a plea agreement. (*Id.* at p. 256.) Our Supreme Court rejected this argument, and held that accurately divulging the terms of a plea agreement is not improper vouching because it does not rely on any information *outside* the record. (*Id.* at p. 257.)

In *People v. Frye* (1998) 18 Cal.4th 894, the court rejected a similar argument that the prosecution committed misconduct by reading an immunity agreement to the jury reciting that the witness had agreed to testify truthfully: "[S]o long as a prosecutor's

assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the ‘facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,’ [the] comments cannot be characterized as improper vouching.” (*Id.* at p. 971, quoting *People v. Medina* (1995) 11 Cal.4th 694, 757.)

Compared to *Williams* and *Frye*, there is even less danger of misleading the jury here. The prosecutor did not read the immunity agreements to the jury; he simply asked Thomas and Pietot, in effect, whether they had entered immunity agreements so they could testify fully without fear of prosecution. This was admissible and relevant in view of the defense theory that the Alcala family had concocted the robbery story in order to hide their marijuana dealing. The jury could not have reasonably understood from the prosecution’s colloquies with Thomas and Pietot that it was relieved of the duty to decide for itself whether these witnesses were truthful. (*People v. Fauber* (1992) 2 Cal.4th 792, 823.)

Appellants complain the prosecutor engaged in further misconduct by making the following statements during his rebuttal argument: (1) “And [Jaime’s counsel] said that she’s never come across a witness like [Ian Avidan] in 20 years, but I will tell you something. [Avidan’s] belch was more credible than Charles Hopkins’ story. At least it was an honest belch”; and (2) “I believe Chivo Thomas when he says that that gun was over there in that shelf behind that door. You know why I believe him? I believe him because of that photograph there [indicating an exhibit].”

Appellants interposed no objection and sought no admonition regarding the prosecutor’s comment on Hopkins’s honesty. They have therefore failed to preserve this issue for appeal. (*People v. Welch* (1999) 20 Cal.4th 701, 753.) In any event, the comment was permissible in light of the surrounding context, in which the prosecutor had discussed trial evidence casting doubt on Hopkins’s story. In context, the remark implied no knowledge of facts *outside* the record proving that Hopkins was lying.

Jaime’s counsel timely objected to the prosecutor’s statement of belief in Thomas’s veracity, and the court admonished the jury that it must decide for itself

whether to believe Thomas. Assuming for the sake of analysis that the prosecutor committed misconduct when he commented that he “believed” Thomas, we find that any minimal risk of harm flowing from the comment was dispelled by the court’s prompt admonition.

Finally, appellants cite as misconduct the following colloquy between the prosecutor and a police witness called by the prosecution:

Q. And were you familiar with the name Tyger Jenkins?

A. Yes.

Q. Why were you familiar with the name Tyger Jenkins?

A. I had been actively looking for Tyger since the incident at the house.

Q. And are you referring to a home invasion robbery that took place on January the 31st, 1998?

A. Yes, sir.

Hopkins’s counsel objected to the reference to “home invasion robbery.” The trial court sustained the objection and admonished the jury that it was for them to decide whether there had been a home invasion robbery.

On this record, we find that the prosecutor’s reference to a robbery was improper, but that the trial court’s sustaining of the defense objection and prompt admonition to the jury to disregard the reference, cured any potential harm. The jury’s acquittal of appellants on the charge of first degree robbery confirms this.

We find no basis for reversing the judgments based on the instances of prosecutorial misconduct alleged, whether viewed separately or cumulatively.

Mistrial Motion

On the ninth day of trial, appellants joined in a motion for a mistrial. As grounds, appellants asserted that: (1) Hopkins’s counsel was prevented by the court from fully cross-examining Thomas; (2) the trial court failed to properly admonish the jury regarding the inadmissibility of lie detector tests after witness Thomas blurted out that he was willing to take one and all the witnesses should take them; and (3) the prosecution’s

alleged vouching for witnesses Thomas and Pietot, discussed above, had prejudiced the defense. Appellants contend the trial court abused its discretion in denying the motion.

Jaime's counsel was the first to cross-examine Thomas. Near the end of Jaime's examination, Thomas was asked about his interview with a police inspector shortly after the incident:

Q. You were asked . . . by Inspector [Maloney] . . . do you sell pot, do you sell weed and you told him no then, didn't you?

A. I did not sell any pot that day or time.

Q. The question was Inspector Maloney asked you do you sell pot and you said no, so you lied to Inspector Maloney, too, right?

A. They said "Do you sell drugs," and I said "No."

A few minutes later, Hopkins's counsel stood up and began asking Thomas about the same interview:

Q. This officer asked you specifically whether or not you sell pot. Do you recall that?

At that point, the prosecution objected, stating, "He's already admitted to that, and I don't think every counsel should have to ask him the same question." The trial court sustained the objection and refused defense counsel's request for a sidebar. In his mistrial motion, Hopkins's counsel explained that he was attempting to show that by the time Maloney interviewed him, Thomas and the other residents of the Alcala household had collectively agreed to deny they were selling marijuana at the house. According to appellants, the trial court's limitation on cross-examination undermined their strategy of trying to discredit the victims' testimony.

Appellants' argument is unconvincing. The trial court merely prevented defense counsel from asking a single, repetitive question. This ruling did not prevent the defense from pursuing in a myriad of other ways whether the Alcala family had concocted a story to conceal their involvement in selling marijuana. For example, Jaime's counsel asked Rose and Tosh directly, and without objection, about conversations among members of the household in which they agreed to deny knowledge of any drug dealing. Hopkins's

counsel pursued this same line of inquiry with Pietot, also without objection. Appellants fail to show any prejudicial curtailment of their right to cross-examine witnesses or pursue their theory of the case.

Regarding Thomas's lie detector comments, the trial court immediately instructed the jury to disregard them. Although it declined the request of Hopkins's counsel that it contemporaneously admonish the jury regarding the inadmissibility of polygraph tests, it did so instruct the jury, in strong terms, after the close of evidence.⁵

The trial court determined that appellants' right to a fair trial was not irreparably damaged by its failure to contemporaneously admonish the jury about the inadmissibility of polygraph evidence. We cannot find that such determination was arbitrary, irrational or outside the bounds of reason. (See *People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) The jury was told to disregard Thomas's comments immediately after he made them. Its obligation to do so was further underlined and explained by a special instruction given before deliberations began. This procedure did not deprive appellants of a fair trial.

Accordingly, we find no error in the denial of appellants' motion for a mistrial.⁶

Instructional Error

The jury in this case was given the following instruction on juror misconduct: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror

⁵ The trial court's concluding instructions included the following special instruction: "Polygraph tests were mentioned here. Under California law, ladies and gentlemen, the results of a polygraph test are not admissible in any criminal proceeding. Therefore, any references of an offer to take a polygraph or failure to take a polygraph or taking polygraphs are inadmissible. You are instructed as I told you at the time to disregard any statement that may have been made regarding polygraph or lie detector tests. They are irrelevant."

⁶ For the reasons stated in the preceding portion of this opinion, we find no merit in appellants' argument that alleged prosecutorial "vouching" for witnesses Thomas and Pietot supported a mistrial.

refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.” (CALJIC No. 17.41.1.)

Appellants contend that the giving of CALJIC No. 17.41.1: (1) infringed on the defendants’ right to jury nullification; (2) misinformed the jury as to the court’s power to intervene into deliberations; (3) undermined juror independence and the defendants’ right to a unanimous jury by assisting majority jurors in imposing their will on “hold-outs.”

After the filing of appellants’ opening briefs and respondent’s brief, the California Supreme Court issued its opinion in *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*). The court held that although CALJIC No. 17.41.1 should not be used in the future, it does not “infringe upon [a] defendant’s federal or state constitutional right to trial by jury or . . . state constitutional right to a unanimous verdict . . .” (*Id.* at p. 439–440.) However, the court recognized that the giving of CALJIC No. 17.41.1 creates a risk of undue court intrusion into or indirect influence over sensitive jury deliberations. (*Id.* at pp. 446–448.) Accordingly, in the exercise of its supervisory powers, the court directed that CALJIC No. 17.41.1 not be given in the future. (*Id.* at p. 449.)

In his reply brief, Jenkins asserts that *Engelman* does not foreclose but supports his non-constitutional claim that he suffered actual prejudice as a result of the use of this instruction. As proof of prejudice, Jenkins asserts that the evidence of his guilt was not overwhelming, and that the jury deliberated for four days and submitted multiple questions and read back requests before deciding the case.

We find Jenkins’s showing insufficient. Although the jury deliberated for approximately 18 hours, the deliberations were not lengthy in relation to the large number of questions the jury had to decide. It was asked to return verdicts on a total of 12 offenses, charged against three codefendants, each involving multiple enhancement allegations and some involving lesser included offenses. There were no reports of any juror refusing to deliberate or follow the law, or of any juror threatening to report another juror for misconduct. The fact that the jury voted to acquit appellants of first degree robbery and could not reach a verdict on the robbery charge against codefendant Jaime

tends to show that jurors felt free to express their differences and to hold on to their views. The handful of jury questions and read back requests are not evidence of juror intimidation or fear. We note that Jenkins's trial counsel neither objected to the instruction in the trial court, nor asked that the jury be polled.

In the absence of tangible evidence that the jury's deliberations were affected by the giving of CALJIC No. 17.41.1, appellants are not entitled to a reversal.

DISPOSITION

The judgments appealed from are affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Stein, J.